UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re:	**)**
Vitamins Antitrust Litigation,	**)**
	)
	) Misc. No. 99-197 (TFH)
	)
This Document Relates to:	**)**
All Actions.	**)**
	)

MEMORANDUM OPINION – Re: Motion for Preliminary Approval and Motions to Intervene

Pending before the Court are Class Plaintiff's Motion for Preliminary Approval of the Settlement and Form and Manner of Notice to the Classes and Motions to Intervene Filed on Behalf of Archer Daniels Midland Company; Cargill Incorporated, Agribands International, Inc., Carl S. Akey, Inc., and The Iams Company ("Independent Plaintiffs"); and Tyson Foods, et al. ("Plaintiff-Intervenors")[1]. After carefully considering these motions, the oppositions filed in response to the motions, and the arguments presented at the November 22 hearing, as well as the caselaw on this subject, the Court will deny these motions to intervene and allow the objecting parties to be heard as amici curiae. The Court will also grant Class Plaintiff's Motion for Preliminary Approval of the Settlement and Form and Manner of Notice to the Classes.

Background

This class action arises out of a worldwide conspiracy or conspiracies to fix prices and allocate

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[1] General Mills, Inc. also filed a Motion to Intervene and For Continuance; however, this Motion was withdrawn at the November 22 hearing because counsel had reached an agreement with the Class.

markets for the sale of bulk vitamins. For almost a decade, officials of some of the world's largest vitamin manufacturers allegedly met in secret to agree upon the means and methods to artificially raise the prices of bulk vitamins sold in the United States and elsewhere in the world. In March 1999, the United States Department of Justice announced that several companies had pled guilty to violating section 1 of the Sherman Act for antitrust violations. Two months later, two defendants pled guilty to violating this Act by fixing the price of certain vitamins. In early September three additional defendants agreed to plead guilty to similar charges. For over a year, lawsuits have been springing up across the country in regards to this alleged conspiracy; approximately fourty-nine cases are now pending before this Court.

On November 3, 1999, Class Plaintiffs and Defendants brought a proposed settlement to the Court. This settlement was revealed to all interested parties at the status conference held on the afternoon of November 3 at which time Class Plaintiffs filed their motion for Preliminary Approval of the Settlement and Form and Manner of Notice to the Classes. The Court issued an order on November 4 allowing all objecting parties to file their motions to intervene and responses to the proposed settlement by November 12 and directing the settling parties to reply to these responses by November 17. A hearing on preliminary approval of the settlement was held on November 22.

The settlement provides for the payment of approximately $1.05 billion in cash to be made available to the Vitamin Products Settlement Class and the payment of at least $5 million and possibly up to $25 million in cash to be made available to the members of the Choline Chloride Settlement Class. The settlement also provides for the payment to Class Plaintiffs' counsel of attorneys' fees of approximately $122 million (together with a fee of 15% of the choline chloride recovery). This

proposed settlement, which is believed to be unprecedented both in amount and in the percentage of recovery of the sales of affected products sold by the Settling Defendants, would resolve the claims against seven international companies and their affiliates, nineteen firms in all: Hoffman-La Roche, Inc., Roche Vitamins, Inc., F Hoffman-La Roche Ltd, Rhone-Poulenc Inc., Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc Rorer Pharmaceuticals, Inc., Rhone-Poulenc S.A., BASF Corporation, BASF AG, Hoechst Marion Roussel, S.A., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Daiichi Pharmaceuticals Co., Ltd., Daiichi Pharmaceuticals Corporation, Daiichi Fine Chemicals, Inc., Takeda Chemical Industries, Ltd., Takeda U.S.A., Inc. and Takeda Vitamin & Food USA, Inc. Sales by these entities are believed to represent more than 90% of the total market for the affected vitamin products.

Discussion

I. MOTIONS TO INTERVENE

In deciding whether or not to grant motions to intervene in class action suits, the Court must strike a "balance between keeping class litigation manageable and allowing affected parties to be adequately heard. . . ." Twelve John Does v. District of Columbia, 117 F.3d 571 (D.C. Cir. 1997). This delicate balancing of interests "turns on a myriad of case-specific facts. . . ." Id.
In this case, the Court must protect the rights of the class to achieve resolution of their cases while at the same time preserving the rights of those who wish to opt-out of the class and negotiate their claims independently or pursue litigation.

The objecting parties argue that they should be granted the opportunity to intervene in this settlement because they allegedly would suffer an "impairment of interest" due to the two-year Most

Favored Nations ("MFN") clause and what they term the "absolute veto" power of Class counsel in deciding whether any opt-outs are in a materially different situation from the Class and thereby not subject to this MFN clause.

Class counsel respond that the two-year MFN clause was essential to this settlement and that without it the parties would not have reached agreement. They also contend that the Class Defendants negotiated for the Class counsels' right to decide whether opt-outs were in a materially different situation. According to Class counsel, this "materially different" clause was desired by Class Defendants as an "escape hatch" which would enable these Defendants to settle with those parties which both sides agreed were in a different situation from the Class.

A. Intervention as of Right

To intervene as of right, these potential intervenor plaintiffs must satisfy the Court that their motions comply with Rule 24(a), which provides, in pertinent part, for intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. . . ." Fed. R. Civ. P. 24(a) (West 1999). Intervention as of right is not warranted, however, if the applicant's interest is adequately represented by existing parties. Id. In this case, the potential intervenors offered no evidence that Class counsel are not adequately representing the interests of the Class[2]; instead, they argued that they may decide to opt-out of the

[2] Archer Daniels Midland Company (ADM) does argue that their interests as a potential Class member are not being represented by Class counsel because ADM is in a materially different situation from other Class members since it suffered from lost profits as well as damages from the overcharges. However, Class counsel represented to the

settlement and therefore Class counsel are not adequately representing their interests. However, the law is clear that Class counsel's obligations do not extend to opt-out plaintiffs. Fields v. Oakwood Mobile Home, Inc., 1999 WL 1005005 at *3 (S.D. Ala. Nov. 1, 1999) ("The plaintiff who seeks only to represent a class of similarly minded individuals would surely owe no duty to individuals who opt out of the litigation. Such plaintiff should not be denied her . . . right to limit and/or waive certain claims solely on the basis that she has failed to represent the interests of individuals who will choose to opt out and to whom thereby she owes no duty.") Therefore, these objecting plaintiffs cannot intervene as of right merely because they do not believe that Class counsel will ultimately be found to be representing their interests in the event that they choose to opt out of the proposed settlement. In order to intervene on the adequacy of representation theory, the potential intervenors must prove that Class counsel are not adequately representing the interests of the Class covered by the settlement. In this case, the opt-out plaintiffs do not contend that this settlement is not in the best interests of the settling Class or that Class counsel are not adequately representing the settling Class's interests. Therefore, the opt-out plaintiffs cannot intervene on the theory of inadequacy of representation.

The issue of intervention as of right in this case ultimately turns on the potential intervenors' argument that they would suffer an "impairment of interest" if not allowed to intervene. To establish this "impairment of interest," these plaintiffs must show that the settlement proposal would cause them "plain legal prejudice." Hirshon v. Republic of Bolivia, 979 F.Supp. 908, 912 (D.D.C. 1997) ("The sole

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Court at the November 22 hearing that other Class members are also in this situation and that this was taken into account in arriving at the settlement figures. The Court has no reason to doubt the validity of this representation.

factor in determining whether . . . a nonsettling party, has standing to object to a settlement agreement is whether the agreement causes him plain legal prejudice. . .") "[S]uch prejudice has only been found to exist in rare circumstances, such as when the settlement agreement strips a non-settling party of a claim for contribution or indemnification, or invalidates a non-settling party's contractual rights." Armco Inc. v. North Atl. Ins. Co., 1999 WL 173579 at *1 (S.D.N.Y. March 29, 1999); see also Agretti v. ANR Freight Sys., 982 F.2d 242, 247 (7th Cir. 1992) ("[C]ourts have repeatedly held that a settlement which does not prevent the later assertion of a non-settling party's claims, although it may force a second lawsuit against the dismissed parties, does not cause plain legal prejudice to the non-settling party.") "Mere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice." Agretti, 982 F.2d at 247.

The opt-out plaintiffs' argument is that the two-year duration of this MFN clause would deprive them of their due process by stripping them of any meaningful opt-out right. Specifically, these plaintiffs argue that it would be impossible for them to negotiate with the defendants on their own terms during the two-year duration of the MFN clause, and that this would in effect force them to either remain in the Class or to litigate this case to the end. However, there is no caselaw to support the proposition that a two-year MFN clause would constitute plain legal prejudice or a denial of due process to opt-outs.

The Court finds that the potential intervenors have not proven the requisite degree of legal prejudice. Their claim is that the MFN clause would prevent the Defendants from settling with them on more favorable terms during its two-year duration because the Defendants would then have to pay the Class this same amount. However, the fact that the opt-out plaintiffs' own settlements may be delayed by this MFN clause is not sufficient to satisfy the plain legal prejudice standard. See Quad/Graphics

Inc. v. Fass, 724 F.2d 1230, 1233 (7th Cir. 1983) ("We do not believe that a court should inquire into the propriety of a partial settlement merely upon a showing of factual injury to a non-settling party. Some disadvantage to the remaining defendants is bound to occur and may, in fact, be the motivation behind the settlement. But just as a court has no justification for interfering in the plaintiff's initial choice of the parties it will sue – absent considerations of necessary parties – the court should not intercede in the plaintiff's decision to settle with certain parties, unless a remaining party can demonstrate plain legal prejudice.")[3]; see also Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 323 (E.D. Pa. 1994) ("Claims that a proposed settlement will merely make it factually more difficult for non-settling defendants to litigate, i.e. that they will incur additional expense, expend additional effort, or suffer a tactical disadvantage alleged nothing more than 'factual injury.' Such factual injury does not rise to the level of 'cognizable prejudice to a legal relationship.'" The opt-out plaintiffs have not proven with any degree of certainty that they will be foreclosed from pursuing their claims in the presence of this MFN clause. Therefore, this Court cannot grant intervention as of right.

B. Permissive Intervention

Rule 24(b) provides that "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of fact or law in common." Fed. R. Civ. P. 24(b) (West 1999). However, this Rule goes on to state that in exercising its discretion, "the court shall consider

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[3] In Quad/Graphics, the Court found no legal prejudice from a settlement agreement which required a settling party to agree that he would not voluntarily assist an objecting, non-settling party in the course of the remaining litigation.

whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. (emphasis added).

In this case, the Court finds it is unnecessary for these potential opt-out plaintiffs to intervene at this stage of the proceeding in order for the Court to consider their objections to the settlement proposal. Courts have consistently held that third parties may be heard on their objections to proposed settlements as amici curiae. See, e.g., New York by Vacco v. Reebok, Int'l, 96 F.3d 44 (2d Cir. 1996); Stewart v. Rubin, 948 F.Supp. 1077, 1105 (D.D.C. 1996), aff'd without opinion, 124 F.3d 1309 (D.C. Cir. 1997); Bowling v. Pfizer, Inc., 159 F.R.D. 492, 495 (S.D. Ohio 1994). Moreover, the Court finds that granting these motions to intervene could unduly prejudice the settling parties by unnecessarily delaying their settlement. "The goals of Rule 23 would be defeated if the Court permitted every individual or entity that objected to discrete aspects of the settlement to intervene." In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 336-37 (N.D. Ga. 1993). The pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes. In re Cincinnati Gas & Electric Co. Sec. Litig., 643 F.Supp. 148, 151 (S.D. Ohio 1986); Muchnick v. First Fed. Sav. & Loan Ass'n of Philadelphia, 1986 WL 10791, at *3 (E.D. Pa. Sept. 30, 1986). Permitting the intervention of the opt-out plaintiffs in this settlement would delay and perhaps destroy the settlement and would thus prejudice the rights of the class members. See Michigan Assocation for the Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981) ("[A]llowing intervention at this point would seriously delay the parties' ability to implement the provisions of the Consent Decree"); Bowling v. Pfizer Inc., 159 F.R.D. 492, 495 (S.D. Ohio 1994) ("By far the most compelling reason to deny the PCO the opportunity to intervene is to immediately

begin implementation of the settlement. The parties have the right to compensation provided under the settlements."). The Court can prevent this delay and still consider the opt-out plaintiffs' objections by granting them leave to participate as amici curiae.

Therefore, because the prejudice to the class would be substantial and because the opt-out plaintiffs can be heard without granting them leave to intervene, the Court will deny these motions to intervene and allow these plaintiffs to participate as amici curiae.

II. Motion for Preliminary Approval of the Settlement

A court should grant preliminary approval of a settlement proposal "if the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval. . . ." See Manual for Complex Litigation, Third, §30.41 (West 1999); In re Shell Oil Refinery, 155 F.R.D. 552, 555 (E.D. La 1993) ("finding that, at the preliminary approval stage, the Court's only task is to determine whether "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preliminary preferential treatment to class representatives or segments of the class, and falls within the range of possible [judicial] approval."). Preliminary approval of a proposed settlement to a class action lies within the sound discretion of the court. Id.; see also In re Southern Ohio Correctional Facility, 173 F.R.D. 205, 211 (S.D. Ohio 1997) (the district court bases its preliminary approval "upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement").

The concerns of these potential opt-out plaintiffs do not reveal the presence of collusion or

other obvious deficiency that would put this settlement outside the range of possible approval and thus warrant denial of preliminary approval at this time. While it is true that the MFN clause in this settlement proposal is unprecedented in its duration, it is also a fact that many aspects of this case are unprecedented, including the over $1 billion recovery agreed to in this settlement proposal. The Court reserves discretion to ultimately consider and rule upon the proper scope and duration of the MFN clause; however, the Court cannot say that the clause is outside the realm of possible approval, considering the apparent complexity of this case and the obvious time and energy that went into this settlement. Since the Court has granted these objecting plaintiffs amici status, their concerns can be readily addressed at the final fairness hearing. Therefore, there is no reason to delay granting preliminary approval of this settlement. Since this settlement is neither illegal nor collusive and is within the range of possible approval, the Court will grant preliminary approval at this time.

Conclusion

For the foregoing reasons, the Court denies the pending motions to intervene and instead will allow these objecting plaintiffs leave to participate as amici curiae. At this time, the Court will grant Class Plaintiffs' Motion for Preliminary Approval of the Settlement and Form and Manner of Notice to the Classes. An order will accompany this Opinion.

November _____, 1999

Thomas F. Hogan
United States District Judge

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ORDER #2 – Re: Motion for Preliminary Approval and Motions to Intervene

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motions to Intervene filed on behalf of Archer Daniels Midland Company ("ADM"); Cargill Incorporated, Agribands International, Inc., Carl S. Akey, Inc., and The Iams Company ("Independent Plaintiffs"); and Tyson Foods, et al ("Plaintiff-Intervenors") are denied. It is further

ORDERED that ADM, the Independent Plaintiffs, and the Plaintiff-Intervenors are granted leave to participate as amici curiae. It is further

ORDERED that Class Plaintiffs' Motion for Preliminary Approval of the Settlement and Form and Manner of Notice to the Classes is granted.

November ____, 1999

Thomas F. Hogan
United States District Judge